

Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments)
FM Broadcast Stations)
(Crisfield, Maryland, Belle Haven, Nassawadox,)
Exmore, and Poquoson, Virginia)

MB Docket No. 02-76
RM-10405
RM-10499

To: Assistant Chief, Audio Division
Media Bureau

**TIDEWATER'S OPPOSITION
TO
COUNTERPROONENTS'
MOTION FOR LEAVE TO FILE FURTHER RESPONSE
TO TIDEWATER'S OPPOSITION TO
COUNTERPROONENTS' MOTION**

Tidewater Communications, Inc. ("Tidewater"), by its attorneys, hereby opposes
"Counterproponents' Motion for Leave to File Further Response to Tidewater's
Opposition to Counterproponents' Motion" filed by Commonwealth Broadcasting, L.L.C.
and Sinclair Telecable, Inc. dba Sinclair Communications (jointly referred to herein as
"Sinclair"). In opposition, Tidewater shows the following:

Background

The facts of this case can be briefly summarized as follows: The Commission
requires counterproposals to be perfect when filed. On June 3, 2002, Sinclair filed a

¹ This Opposition is timely filed by October 17, 2002 (10 days plus 3 days for service by mail, excluding holidays). See Title 47 C.F.R. §1.45(b). Sinclair's Motion was filed October 1, 2002.

Counterproposal that was defective because its reference site² was offshore when plotted on a topographic map. When Tidewater pointed this out, Sinclair attempted to show that the reference site was not offshore according to a global positioning system (“GPS”) receiver. However, the GPS information was for a different site almost 5 kilometers distant from the original reference site.³ As a prophylactic measure, Sinclair attempted to specify a new site⁴, but that site was also about 5 kilometers away from the original site. Now, Sinclair has proffered yet another unauthorized Response to Tidewater’s timely filed July 16, 2002, “Reply Comments on Counterproposal.” Sinclair wants to specify yet another reference site.⁵ Like its first unauthorized Response, filed August 14, 2002 (“Patch Attempt No. 1”), Sinclair’s “Further Response” (“Patch Attempt No. 2”) must be rejected. Patch Attempt No. 2 is nothing more than a second unauthorized supplement to its fatally-defective Counterproposal, the overreaching purpose of which is to move WROX, Cape Charles, Virginia into the Norfolk market.⁶

² NL 37° 12’ 30 , WL 76° 25’ 05 (Reference Site No. 1).

³ NL 37° 12’ 30”, WL 76° 29’ 05 (Reference Site No. 2).

⁴ NL 37° 12’ 30”, WL 76° 29’ 07 (Reference Site No. 3).

⁵ NL 37° 12’ 30”, WL 76° 25’ 07 (Reference Site No. 4).

⁶ To pull off this move-in, Sinclair proposed (1) the allotment of Channel 250B1 to the hamlet of Belle Haven, Virginia; (2) the substitution of Channel 290A for vacant Channel 252A at Nassawadox, Virginia; (3) the re-allotment of Channel 291A from Exmore, Virginia, to a bedroom community in the Norfolk/Virginia Beach/Newport News, Virginia, Urbanized Area called Poquoson with concurrent modification of the license of Sinclair’s WROX, Cape Charles, to operate at Poquoson; and (4) the reallocation of Channel 241B from Cape Charles, Virginia, to Exmore, Virginia, resulting in the removal of the only commercial radio station from Cape Charles. Sinclair has claimed its Counterproposal is mutually-exclusive with a proposal by Bay Broadcasting, Inc. (“BBI”) to change the operating channel of WBEY, Crisfield, Maryland.

Sinclair has filed a motion devoid of any legal precedent seeking consideration of Patch Attempt No. 2. Sinclair merely argues that Tidewater “distorts the record...suggests that the Counterproposal was not mutually exclusive with WBEY’s Crisfield proposal...[and] asserts therefore that a new rulemaking should be launched.” Sinclair accuses Tidewater of “delaying intent,” and argues that Sinclair should be allowed to respond to Tidewater’s arguments “raised for the first time” in a procedural opposition. Sinclair believes that it should be allowed to reply to Tidewater’s “preposterous proposal.”

Sinclair’s “Further Response” improperly lambastes Tidewater for (1) “unfair exploitation of an obvious typographical error;” (2) making a “late-filed zoning argument;” and (3) a “transparent effort to sabotage this proceeding and dramatically delay consideration of the Counterproposal by asking for severance of the Counterproposal and initiation of a needless additional rule making.” None of Sinclair’s arguments are well taken.

Patch Attempt No. 2 Should Be Rejected

Sinclair’s Reference Site. In a rule making proceeding involving a counterproposal, the Commission affords interested parties 15 days after the counterproposal appears on public notice to file reply comments. No additional comments are authorized. In its timely filed Reply Comments, Tidewater filed a copy of a segment of a USGS 7.5 minute topographic map with Reference Site No. 1 plotted thereon showing that Sinclair’s reference site was offshore. But, in Patch Attempt No. 1, Sinclair argued that, based on a GPS reading, its reference coordinates are on shore and supported that statement with a declaration (Sinclair Exhibit No. 2) from its chief

engineer, L. Joseph Hardin. Hardin swore under penalty of perjury that he measured Sinclair's reference site with a GPS receiver and found the site at **North Latitude 37° 12' 30.0" and West Longitude 76° 29' 05.0"** (Reference Site No. 2) to be on land. The Technical Exhibit (Attachment A) prepared for Tidewater showed that Reference Site No. 2 is indeed on land, but the site is short spaced to Station WRDU, Wilson, NC, by 4.58 km. Since Reference Site No. 2, verified to be accurate by Hardin, is short spaced and unusable, it did not rebut Tidewater's showings. Tidewater also showed that Reference Site No. 3 was also short spaced to WRDU and did not afford city grade service to Poquoson, the proposed community of license for WROX. Those revelations triggered Patch Attempt No. 2 which, *inter alia*, attempts to specify Reference Site No. 4.⁷ Sinclair decries Tidewater's Opposition to its unauthorized pleading as a "cynical effort to exploit an obvious typographical error." However, it is indisputable that Tidewater had the right to expose the flaws in Sinclair's counterproposal. It was Sinclair, not Tidewater, that selected the unusable Reference Site No. 1 for the Poquoson move-in. It is not Tidewater's fault that Sinclair's consultants chose to use Delorme Topo USA, Version 3.0 to plot the reference coordinates instead of plotting the coordinates on a 7.5 minute topographic map that would have clearly showed that Reference Site No. 1 was off shore. In Patch Attempt No. 1, Sinclair tried to specify Reference Site No. 3 (See Sinclair Exhibit No. 1, Technical Comments of Graham Brock, page 2). Tidewater filed

⁷ Under Section 1.45(c), Sinclair had 5 days (plus three extra days for mailing, excluding holidays) to file a reply to Tidewater's Opposition. Therefore, the pleading cycle ended for Sinclair's motion on September 10, 2002, without Sinclair filing a reply. Instead, Sinclair has filed Patch Attempt No. 2 in an attempt to **start** the pleading cycle again and have another bite at the apple after Tidewater files its opposition. Sinclair's cynical effort to exploit the Commission's pleading rules is unavailing. All of Sinclair's post-June 3, 2002, pleadings must be treated as unauthorized and not considered in this proceeding.

a Technical Exhibit showing that this new site is also on land but is also unusable since it is 4.61 km short spaced to WRDU and would not provide city-grade service to all of Poquoson. Patch Attempt No. 2 is an ineffective attempt to explain that away as “an obvious typographical error.”

Sinclair wants the Commission to ignore statements made in a declaration under penalty of perjury.⁸ Mr. Hardin swore that he took his Garmin ETREX global positioning system (“GPS”) receiver out to the site and there and then found the coordinates of the Poquoson Channel 291A site “as measured with the GPS receiver are North Latitude 37° 12’ 30.5” and West Longitude 76° 29’ 03.8” (NAD 1983). Using the NADCON program, the coordinates converted to NAD 1927 and North Latitude 37° 12’ 30” and West Longitude 76° 29’ 05.0.” Hardin submitted as Exhibit No. 1 to Patch Attempt No. 2 another Declaration in which he says the coordinates were incorrect and resulted from a typing error, but, a typing error cannot explain how Hardin read one set of coordinates off the GPS in NAD 1983 datum and converted it to NAD 1927 in order to arrive at the new coordinates. What this really means is that the FCC cannot rely on either of Hardin’s declarations and must not consider them. In Exhibit No. 2 to Patch Attempt No. 2, Sinclair’s technical consultant also claims the coordinates to be based on a typographic error, the genesis of which was Hardin’s Declaration; again Sinclair’s late-filed and newly proffered evidence is so unreliable that the Commission should simply rely on the reference coordinates that Sinclair, not Tidewater, specified in Sinclair’s counterproposal.

⁸ See Exhibit No. 2 to Patch Attempt No. 1.

It is Sinclair, not Tidewater, that created the predicament with which Sinclair is faced. Based on Sinclair's record of missteps and incompetence, the Commission cannot rely on anything Sinclair says. Owing to the discrepancies between the GPS reading and the topographic map, and the unreliability of Mr. Hardin's work, the Commission must reject Sinclair's further response. Relying on the coordinates plotted on the USGS topographic map is the best evidence since the map was prepared by an impartial party and the FCC staff can easily verify the location of the coordinates by simply plotting the coordinates itself. GPS receivers are inherently unreliable for precise geographical measurements, and Sinclair did not submit any evidence as to the accuracy of the instrument Mr. Hardin used or his proficiency at making GPS measurements.

The Zoning Problem. As Tidewater argued in its previous opposition, even if Sinclair could get its story straight, figure out where its reference site is, and specify a site on land that would meet spacing and city-grade requirements, it is too late to amend the counterproposal to change the reference coordinates. Tidewater showed that even if the Commission were to allow Sinclair to specify a new set of reference coordinates in the area near its original reference site, the proposed area would be unsuitable for a radio tower because (a) the location falls within the Chesapeake Bay Preservation Area and will require an approval from them, (b) the location will require approval by the Wetlands Board; (c) the location will require approval from the Army Corps of Engineers; and (d) the location is zoned Residential and a tower could not be built without a special use permit. Tidewater reported that Tim Cross, the person in the York County Planning Commission that would be the first to handle an application for any tower in York County, assured Mr. Crowder that no one has applied for a permit to build a tower in the

vicinity of Sinclair's reference coordinates, and that any attempt to build a tower at that location would cause him "real concern". Sinclair attacks Tidewater's showings as "too little, too late," because, in Sinclair's view, the argument could have been made in Tidewater's earlier reply. But, that is not the case. Tidewater showed that the Poquoson reference site falls off shore when plotted on a 7.5 minute topographical map. There was no need to explore the zoning problems since the site was clearly unsuitable. However, when Sinclair attempted to specify a new site on land, it was appropriate for Tidewater to demonstrate that the new site would be unsuitable for the reasons stated in Tidewater's Opposition. The cases cited by Sinclair would only apply if Sinclair had specified the new site in its Counterproposal; in which case, Tidewater and other parties would be on notice of *the* specified site and could have investigated the zoning status of the site. Sinclair has presented a fluid proposal by attempting to specify new reference coordinates which were not in the original counterproposal. In fact, Sinclair's citation of the zoning cases', which would result in significant expenditure of resources, amply demonstrates why the Commission expects Counterproposals to be correct when filed.

Severance of the Counterproposal. Sinclair's counterproposal was never truly mutually exclusive with BBI's Crisfield proposal. Sinclair accuses Tidewater of "seizing on a footnote" in Sinclair's papers to the effect that, even if Sinclair's proposal for Belle Haven fails, the Poquoson move-in should go forward. Again, it was Sinclair, not Tidewater, that chose to introduce that bit of information in this proceeding. If the Belle Haven proposal fails, the counterproposal is plainly NOT mutually exclusive with the

⁹ *Lake Crystal, Madelia, Mankato and Vernon Center, Minnesota*, 13 FCC Rcd 5269 (1998) and *Albion, Lincoln and Columbus, Nebraska*, 10 FCC Rcd 11931 (1995).

BBi proposal, and the Poquoson component cannot be effectuated at this time. Sinclair has not shown how it, or the public interest, would be disserved if its proposal becomes the subject of a further notice of proposed rule making issued pursuant to Section 1.421 of the Rules.” That would be a compromise position, since Tidewater’s preferred option is the dismissal with prejudice of Sinclair’s counterproposal.

Sinclair’s Unauthorized Further Response May Not Be Considered

Counterproposals must be technically correct and substantially complete when filed and that counterproposals will be considered only if they are filed by the deadline date for comments. Case after case restates this core principle.” Sinclair is, once more, trying to correct its flawed proposal, which is impermissible. Sinclair’s Patch Attempt No. 2 should not be accepted and the counterproposal should be dismissed as

¹⁰ “In any rulemaking proceeding where the Commission deems it warranted, a further notice of proposed rulemaking will be issued with opportunity for parties of record and other interested persons to submit comments in conformity with §§ 1.415 and 1.419.”

¹¹ See *Broken Arrow and Bixby, Oklahoma*, 3 FCC Rcd 6507 (1988), where the Commission said “Counterproposals must be technically correct at the time of their filing so that all parties are afforded an opportunity to respond in reply comments. Therefore, we shall not accept [counterproponent’s] Supplemental Comments which attempts to correct the deficiencies in its counterproposal” In *Springdale, Arkansas, et al.* 4 FCC Rcd 674 (1989), the Commission refused to place a counterproposal on public notice because the reference coordinates were short spaced to a constraint: “Although CBC attempted to correct the deficiencies in an amendment, arguing that the new reference coordinates supplied in the amendment were submitted in order to correct a typographical error in the counterproposal, the amendment is equally unacceptable. ...Counterproposals must be technically correct and substantially complete when filed in order to afford all parties an opportunity to fully respond in reply comments.” See also, *Provincetown, Massachusetts*, 8 FCC Rcd 19 (1992) (“Counterproposals must be technically correct and substantially complete where filed. At a minimum, we have held that the petitioner must provide the specific channel and class, specific transmitter site coordinates, and engineering studies which indicate that the station would meet minimum separation and city grade coverage requirements...”). See *Rosendale, New York*, 10 FCC Rcd 11471 (1995) at footnote 1 (“Counterproposals must be technically and procedurally correct and **may not be amended at a later date.** [Emphasis added]”).

inadvertently placed on public notice. Sinclair took advantage of the Commission's policies to cut off any opportunities for other parties to file conflicting proposals. When Sinclair elected this route, it assumed the well-known risk that it must file a virtually perfect counterproposal or face dismissal. Because of this, Sinclair's counterproposal must rise or fall on the strength of its June 3, 2002, submission alone and the reference coordinates specified therein. Since BBI and Tidewater had only the right to reply to the counterproposal as filed, suffering Sinclair to patch up its tattered demotion counterproposal at this juncture would fly in the face of due process and fair treatment to BBI and Tidewater.

Conclusion

Despite Sinclair's second effort to correct the defects in its counterproposal, it is obvious that the counterproposal was defective when filed. Sinclair's counterproposal must be considered to have been inadvertently placed on public notice. In light of that, it should be dismissed so that the competing proposal of BBI to exchange Channel 250A for Channel 245A at Crisfield, Maryland, can **be** granted.

Respectfully submitted,

TIDEWATER COMMUNICATIONS, INC.

A handwritten signature in black ink, appearing to read 'Gary S. Smithwick', with a large circular flourish at the beginning and a horizontal line extending to the right.

Gary S. Smithwick
Its Attorney


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CERTIFICATE OF SERVICE

I, Sherry L. Schunemann, a secretary in the law offices of Smithwick & Belendiuk, P.C., certify that on October 17, 2002, copies of the foregoing TIDEWATER'S OPPOSITION TO COUNTERPROPONENTS' MOTION FOR LEAVE TO FILE FURTHER RESPONSE TO TIDEWATER'S OPPOSITION TO COUNTERPROPONENTS' MOTION were sent via first class mail, postage pre-paid (or as otherwise specified), to the following:

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Sherry L. Schunemann